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82-746

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MOHAMED HABIB and
MIDDLE EAST SERVICES
A Division of Mundus, Inc.,
Petitioner

vs.

RAYTHEON COMPANY and
RAYTHEON SERVICE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia

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QUESTION PRESENTED

The District Court and the Court of Appeals unconstitutionally applied Rule 60 (b) by refusing to consider extrinsic evidence, (outside the record) which supported the Motion for Relief from Judgment of the Appellant Habib.

Appellant Habib detailed extrinsic evidence in his affidavit together with a letter written subsequent to the judgment by his former attorney supporting his motion, all of which was never considered by the Court, thereby denying Appellant Habib his rights under the due process clauses of the Constitution of the United States.

The Court erred as a matter of law in affirming the District Court order in spite of the recognition by the Court of Appeals in its order that the Appellant Habib had been denied a hearing on his extrinsic evidence.

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Griffin v. Kennedy, 344 F2d 198 (D.C.C.C. 1965).

Huntington Cab Company v. American Fidelity and Casuality Company 4 FRD 496 (1945 D.C. W.VA.)

Kapprott v. United States, 355 U.S. 266 (1949).

Patapoff v. Vollstedts, Inc. 267 G3f 863 (CA 9 OR 1959).

Phillips Morris, Inc. v. Sun Leasing Company, 371 F Supp 1233 (D. C. NY 1974).

Smith v. Widman Trucking and Excavating, 627 F2d 792 (1980).

Thomas v. Colorado Trust Deeds Funds,Inc., 366 F2d 136 (10th Cir 1966).

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vs.

RAYTHEON COMPANY and
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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
IN THE DISTRICT OF COLUMBIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the Urited States.

Mohamed Habib, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above-entitled case on June 15, 1982.

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia is printed in Appendix A, hereto, infra, page A-1. The judgment of the United States Court of Appeals for the District of Columbia Circuit is printed in Appendix A, hereto, infra, page A-6.

JURIDICTION

The judgment of the United States Court of Appeals for the District of Columbia (Appendix A, infra, page A-6) was entered on July 15, 1982. A timely petition for rehearing was denied on July 30, 1982. (Appendix A, infra, page A-9). The jurisdiction of the Court is invoked under the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

CONSTITUTIONAL AMENDMENTS INVOLVED

The constitutional amendments involved are the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Rule 60(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE AND REASONS FOR GRANTING THIS WRIT

Appellant Habib on May 14, 1982 filed his Motion for Relief from a Judgment of dismissal with prejudice entered on October 15, 1980 in the U.S. District Court. The motion was supported by a detailed affidavit and supported by a letter dated after the judgment which letter demonstrated a fraud on the court. A request for an Oral Hearing and the Issuance of Subpoenas for witnesses to be heard on said Motion was filed with the Motion. Further, the Motion included; a request for a subpoena duces tecum of the files which had been withheld from him by his former attorneys, Blum and Nash; a release of a protective order of certain pertinent files of the Appellee Raytheon which support the Appellant's claim; and a subpoena for the files supporting Appellant Habib's claim which were contained in the Securities and Exchange Commission investigation of Appellee Raytheon and their payment of fees and commissions to foreign agents.

None of these items were a part of the record and were extrinsic evidence and never considered by the Court.

On June 9, 1981, the Honorable Oliver Gasch of the District Court of the District of Columbia summarily denied the Motion without any oral hearing and without any written opposition to the motion or any proceeding of any type. The Court relied solely on the intrinsic evidence of the record in Court and refused to consider the extrinsic evidence, outside the record which was detailed in the Affidavit of the Appellant Habib and a letter by Appellant Habib's former attorneys which acknowledge there was a committment which was not in the record.

The Appellant Habib's claim is not a substitute for appeal. Substantial justice has not been achieved and the Appellant Habib is entitled to a liberal construction of his claim in order to achieve substantial jutice. The motion is timely. The judgment was a dismissal without any decision on the merits and there is

no question that Appellant Habib's claim has merit which he is prepared to present to the jury. The Appellant Habib has not had an opportunity to present his claim. The Appellate Court in ruling on a summary judgment for the Appellee held in a prior decision of this case that his case should be heard on the merits. (Habib v. Raytheon, U.S. Court of Appeals for the District of Columbia CA 79-1147). No intervening rights would be prejudiced by granting relief. No great delay is likely to occur. The amount of money involved is great.

Both the Court of Appeals and the Trial Court admit that their decision is based solely on the record. It is undenied that they failed to consider the Appellant's affidavit of extrinsic evidence.

The fraud and duress upon which the Rule 60(b) motion of the Appellant Habib is based is outside the record.

The Court of Appeals erred in treating the trial court decision as a factual decision rather than a legal decision. The statement of the Court of Appeals stated that it "might indeed have been preferable to afford appellant a fuller hearing on his present allegations that the stipulated dismissal was in fact induced by collateral threats and promises . . . "

No "fuller hearing" could have occurred since there was "no hearing of any kind" The trial court summarily dismissed the Motion without any hearing and even without requiring the appellee to deny the extrinsic evidence alleged in the affidavit. The facts of the affidavit stand unheard and undenied and for the purposes of a 60(b) Motion they stand as true. Upon these undenied facts the motion should have either been granted or a hearing on the motion held as a matter of law. Neither was done and the Appellant was denied his rights to have due process of the law by an unconstitutional application of Rule 60(b).

The Supreme Court decisions on the application of Rule 60(b) demonstrate conclusively that the Court of Appeals decision in the instant case is a denial of the rights of the Appellant. No hearing of the Appellant's allegations was permitted. The decision was made on resort only "to the record". The Appellant's Motion for Relief from Judgment is based on facts "outside the record". The effect of the decision is to simply treat Rule 60(b) as a substitute for appeal. This is clearly an unconstitutional application of the principle of law and a denial of due process of law. The very purpose of Rule 60(b) is a definite recognition that the interest of the law is to provide justice not merely a technical application of sterile procedues and not merely a resort to the record.

The Court of Appeals and the Trial Court specifically denied Appellant Habib the right to have his case heard on the merits in spite of the previous Court of Appeals' decision which ordered a trial on the merits.

This case has not been heard on the merits. It was previously on Appeal before the Court of Appeals and the case was remanded for a trial on the merits (Habib v. Raytheon U.S. Court of Appeal, CA 79-1147, 1980).

The law is clear that:

> " . . . where denial of relief precludes examination of the full merits of a cause, even a slight abuse may justify reversal"
> Seven Elves v. Eskanazi

635 F2d 396 (5th CC) 1981.

See the United States Constitution of America, 5th Amendment and 14th Amendment. See Federal Rules of Civil Procedure, Rule 60 (b). See 7 Moore's Federal Practice Section 60.19 (237-239). See Klapport v. United States, 355 U.S. 266 (1949) in which Justice Black set aside a judgment by default and ordered a hearing on the merits. See Griffin v. Kennedy, 344 F2d 198 (D.C.C.C. 1965) in which counsel's ill-advised action held should not deprive plaintiff of his day in

court. See Smith v.Widman Trucking v. Excavating, 627 F2d 792 (1980) in which a liberal interpretation to set aside a judgment was applied due to action of attorney. See Assman v. Fleming, 159 F2d (CA 8 Neb 1947) where merits of case not heard, fraud is obtaining judgment is ground for setting aside judgment. Bridoux v. Eastern Airlines 214 F2d 207 (D.C.C.C. 1954) where denial of hearing on merits is cause for reversal of judgment. Patapoff v. Vollstedts, Inc. (267 F2d 863 CA 9 OR 1959) where a hearing on the merits is the purpose of Rule 60(b). Phillip Morris, Inc. v. Sun Leasing Co. 371 F Supp 1233 (D.C. NY 1974) Rule 60(b) applied where plaintiff's consent to dismissal was obtained by implied promise by defendant. See Fleming v. Huebsh Laundry Corp. 159 F2d 581 (7th Cir 1947); Associated Discount Corporation v.Goldman 524 F2d 1051 (3rd Cir 1975); and Thomas v. Colorado Trust and Deeds Fun Inc. in which consent judgments were set aside. See Huntington Cab Co. and American Fidelity and

Casualty Company 4 FRD 496 (1945 D C WVA) in which the court found the decision is to be based on the merits and Rule 60 b applied.

The petitioner Habib is claiming a fraud on the trial court. His evidence in support of this claim is not to be found in the record of the trial proceedings. The evidence was outside the record and includes extreme pressure, amounting to duress on the part of his attorneys, promises by his own and defendant attorneys for favorable future business with Kamal Adham and The Prince, as well as counter balancing threats by the Prince if Habib did not acceed to the Prince's wishes to dismiss the case, threats that Raytheon would press the claim for $700,000 for defense legal fees and that the court would grant it and that the judge smarting from being previously reversed by the District Court of Appeals would render a decision that "would ruin you financially." All of this evidence was not a part of the trial record. It was outside of the record. Yet the Court of

Appeals' decision was based on the trial record only. Their premise was subsequently acknowledged in a letter by Habib's attorney to defendant's attorney. Habib should have had an opportunity of a hearing in order to put in evidence in support of the above circumstances.

There was no hearing - no fuller hearing - there was no hearing at all. Rule 60 may be constitutional but in this instance it was unconstitutionally applied. Due process requires a reversal of the Court of Appeals' decision with a remand to the District Court for hearing which will permit Habib to subpoena all the lawyers and other documents in the development to prove his plea.

There is no question that there has been gross abuse of discretion by the trial judge; a trial judge who was previously reversed in this same case. Language of Rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. Klapport v. U.S., (1949) 335 U.S. 60).

The Trial Court and Court of Appeals makes Rule 60 (b) a nullity by restricting their decisions simply to intrinsic evidence and by relying only on the record of dismissal. The trial court and the Court of Appeals summarily ignore the written evidence of the fraud on the court and the affidavit of the Appellant that the dismissal was obtained by duress in direct denial of due process of law. Written evidence, outside the record, by the prior lawyers in the case, conclusively support the Appellant's Motion.

Habib is a small business man. This is a ten years effort on his part to seek and obtain justice for wrongs that Raytheon has imposed upon him.

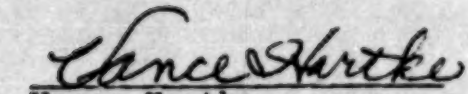
The procedure applied in this case is a unconstitutional application of Rule 60(b) and a denial of due process of law to the Appellant by failing to consider facts outside the record.

Certorari should be granted to provide for the constitutional rights of due process of the Appellant.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted



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